(26,742)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 656.

LEO WEIDHORN, PETITIONER,

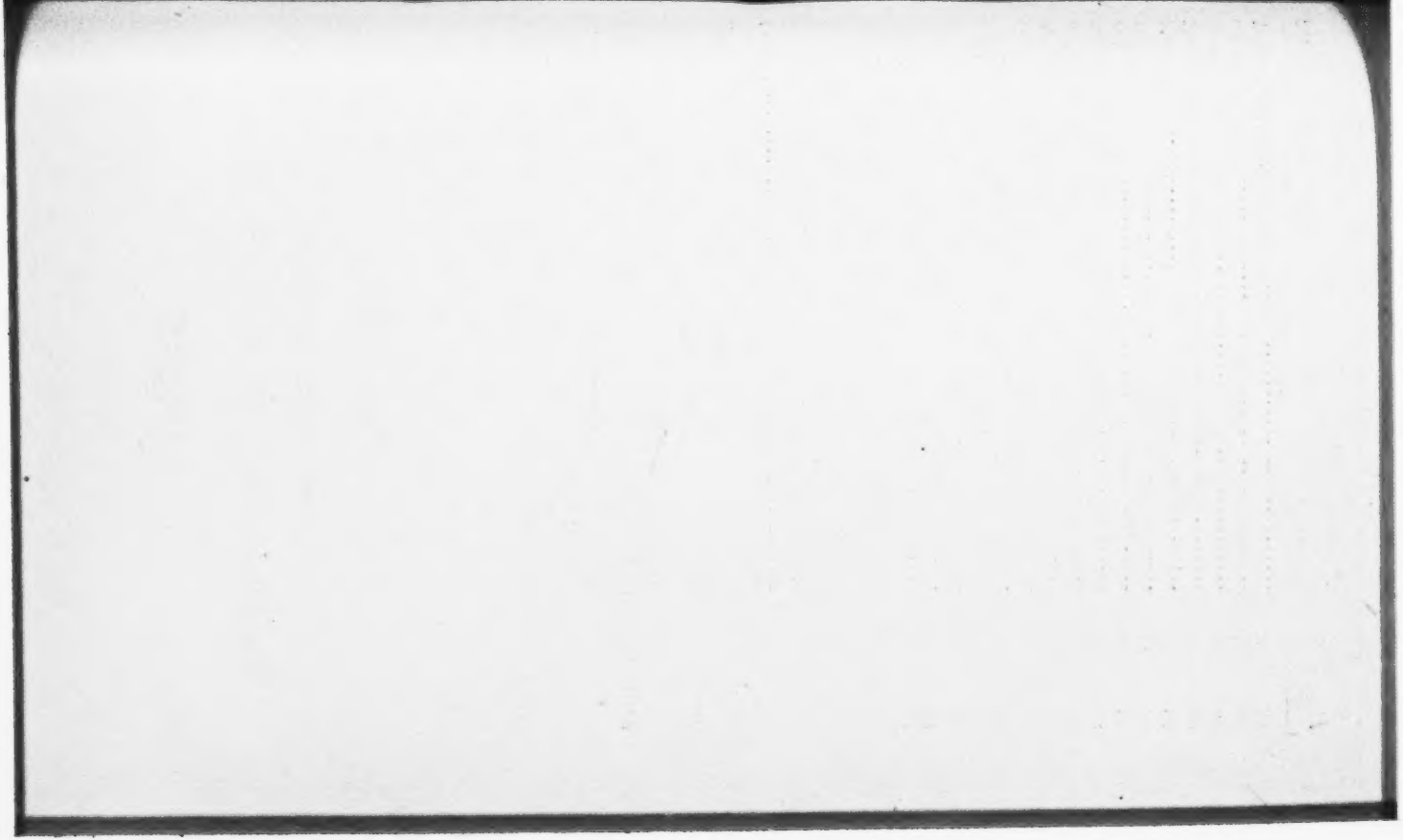
vs.

BENJAMIN A. LEVY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF J. HERBERT WEIDHORN, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1919.



6 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

RECORD.

Percy A. Atherton, Swift, Friedman, & Atherton, for Petitioner.
William M. Blatt, for Respondent.

Boston: Printed under direction of the clerk. 1917.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

[Filed in Circuit Court of Appeals September 6, 1917.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Respectfully represents Benjamin A. Levy, of Boston, in the District of Massachusetts, trustee of the estate of J. Herbert Weidhorn, in bankruptcy, No. 23,319, in proceedings pending in the United States District Court for the District of Massachusetts, against Leo Weidhorn, from whom relief is sought, the solicitor of record of said Leo Weidhorn in said proceedings in the District Court being William M. Blatt, Esquire:

First. That on March 17, 1916, your petitioner was at the first meeting of creditors of the bankrupt, J. Herbert Weidhorn, elected trustee in bankruptcy of said bankrupt and forthwith qualified as such.

Second. That on April 1, 1916, your petitioner filed with the ref-

eree in bankruptcy, to whom the bankruptcy case of J. Herbert Weidhorn had been referred by general reference, a bill of
2 complaint against one Leo Weidhorn, seeking to set aside two certain conveyances of property made by the bankrupt to his brother, Leo Weidhorn, on the ground that said conveyances were invalid because made in fraud of creditors under the Statute of Elizabeth and the Bankruptcy Act, Sec. 70e. A copy of said bill is hereto annexed marked "A." Upon the filing of this bill, the referee in bankruptcy issued a subpœna under the Equity Rules of the United States District Court for the First District, and also issued a temporary restraining order, as prayed for, restraining the transfer of the property pendente lite. A copy of the subpœna issued is annexed hereto marked "B," and a copy of the restraining order issued is hereto annexed marked "C." Thereupon the defendant, Leo Weidhorn, named in said bill, appeared on April 7, 1916, a copy of which appearance is hereto annexed marked "D," and filed, on April 24, 1917, with the referee an answer to the said bill of complaint, and subsequently, on April 25, 1917, filed a motion to dismiss the bill of complaint for want of jurisdiction. A copy of the answer is annexed hereto marked "E." A copy of the motion to dismiss is hereto annexed marked "F."

Third. The referee overruled the motion to dismiss, heard the parties and their counsel on the merits, and subsequently, on July 27, 1917, entered a decree declaring said conveyances void as against the creditors of the bankrupt, and as against your petitioner as trustee, and ordering said Leo Weidhorn to surrender the warehouse receipts and to execute to the trustee a bill of sale of said goods. A copy of said decree is annexed hereto marked "G."

Fourth. The said Leo Weidhorn, on August 1, 1917, petitioned to have said decree duly reviewed, a copy of which petition is hereto annexed marked "H," and thereupon the referee certified to the District Judge the questions raised by said petitioner for review, a copy of which certificate is hereto annexed marked "I."

Fifth. That arguments on said petition for review and referee's certificate were duly heard before the Honorable Judge of the District Court, and thereafter, on March 8, 1917, the Honorable Judge of the District Court filed an opinion in said cause, holding
3 that the referee had no jurisdiction. A copy of said opinion is hereto annexed marked "J," and on March 8, 1917, a decree was entered following said opinion, vacating the referee's decree and dismissing the bill, with costs, a copy of which decree is hereto annexed marked "K."

Sixth. Your petitioner says that in this proceeding there is manifest error in the following particulars, to wit:

(1.) The court erred in ruling that the respondent reasonably objected to the jurisdiction of the referee and afterwards filed an answer to the merits.

2.) The court erred in ruling that under the terms of a general reference to the administration of the estate to the referee, there was not included authority to hear and determine the issues raised by the bill of complaint herein referred to.

(3) The court erred in ruling that the referee has no jurisdiction.

(4) The court erred in not ruling that the referee had jurisdiction by consent of the parties.

(5) The court erred in not ruling that the referee had jurisdiction under the terms of a general reference of a bankruptcy case under General Orders XII. (1) to entertain and hear this suit brought by the trustee in bankruptcy to set aside property alleged to have been conveyed away by the bankrupt prior to his bankruptcy in fraud of creditors.

(6) The court erred in ruling that an order should be entered vacating the decree and dismissing the bill with costs as taxed in an equity suit in the District Court.

Wherefore, your petitioner prays:

(1.) That a decree be entered in this court in accordance with the rights of your petitioner in the foregoing matters.

(2.) That a decree be entered reversing or nullifying the order, and decree vacating the referee's decree and dismissing the bill, with costs, as taxed in an equity suit in the District Court.

(3.) That a decree be entered affirming the terms of the decree heretofore entered by the referee.

(4.) That your petitioner be granted his costs.

4 (5.) That your petitioner be granted such power and further relief as to this Honorable Court may seem proper.

BENJAMIN A. LEVY,
Trustee in Bankruptcy, Estate of J. Herbert Weidhorn,

By his attorneys,

SWIFT, FRIEDMAN & ATHERTON.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, clerk of the District Court of the United States, for the District of Massachusetts, hereby certify that the following are true copies of the

Bill of Complaint, filed April 1, 1916;

Subpœna, issued April 7, 1916;

Answer of Leo Weidhorn, defendant, to Bill of Complaint, filed April 24, 1916;

Motion to Dismiss Bill of Complaint, filed April 25, 1916;

Decree on Petition of B. A. Levy, Trustee, v. Leo Weidhorn et al., entered July 27, 1916;

Petition for Review, filed August 1, 1916;

Certificate by Referee to Judge on Petition of Benjamin A. Levy, Trustee, v. Levy Weidhorn and The Boston Storage Warehouse Company, filed October 2, 1916;

Opinion of the Court, handed down March 8, 1917, and

Order on Certified Question, entered March 8, 1917, in the cause entitled, No. 23,319, in Bankruptcy. In the Matter of J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Boston, in said district, this fourteenth day of May, A. D. 1917.

[SEAL.] WILLIAM NELSON, *Clerk.*

5 A.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319, in Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Benjamin A. Levy, of Boston, Massachusetts, as he is Trustee in Bankruptcy of Herbert Weidhorn, Plaintiff, now brings this Bill of Complaint against Leo Weidhorn, of said Boston, and The Boston Storage Warehouse Company, a corporation duly organized by law, and having a usual place of business in said Boston, Defendants.

To the Honorable James M. Olmstead, Referee in Bankruptcy in and for the county of Suffolk:

Respectfully represents Benjamin A. Levy, and says:—

That he is duly elected trustee in bankruptcy of J. Herbert Weidhorn, and that he has duly qualified and is now acting as such.

Upon information and belief the plaintiff alleges:—

1. That at all times hereinafter mentioned the said bankrupt was engaged in the business of selling at retail jewelry and kindred merchandise at two or more stores, principally in the city of Boston; and that while so engaged, on or before the third day of February, 1915, he was indebted to various persons in the regular course of business. That at said time he had a considerable stock of merchandise upon premises occupied by him at No. 671 Washington Street, in said Boston, which could be come at, and be attached, and applied by his said creditors in satisfaction of their respective claims.

6 2. That in the course of his said business the said bankrupt proposed to contract other indebtedness from time to time thereafter, which he was not certain he could discharge as and when the same matured in the rugular course of business; that thereupon, conceiving a scheme to hinder, delay and defraud his creditors, present and prospective, he entered into a conspiracy with the respondent, Leo Weidhorn, his brother, who was then, and still is, engaged in Boston in business as an insurance broker, whereby they proposed to cause a mortgage to be executed, conveying all of the property of the bankrupt, J. Herbert Weidhorn, for a purported consideration of $9091.14, for the purpose of preventing creditors of the said J. Herbert Weidhorn from reaching or applying to their claims any of the assets described in the said mortgage, and thereby hindering, delaying and defrauding creditors, present and prospective.

3. That thereupon, in pursuance of said conspiracy and scheme, on or about the third day of February, 1915, the bankrupt (hereinafter also referred to as the mortgagor), signed, sealed and delivered to the defendant, Leo Weidhorn (hereinafter referred to as the mortgagee), a mortgage bill of sale, purporting to secure a loan of $9091.14, and purporting to mortgage to the said mortgagee the following described goods and chattels, of which the mortgagor was then the apparent owner, to wit:—

"all my" (meaning the said bankrupt) "stock in trade of jewelry, watches, clocks, optical goods, diamonds, precious stones and the safe and cash register, and all tools, show cases, wall cases and fixtures located and situated in the store and show windows occupied by me" (said bankrupt) "at No. 671 Washington Street, in said Boston, meaning and intending hereby to convey and transfer any and all personal property belonging to me" (said bankrupt) "which is located in said store and show windows."

which said mortgage was duly recorded in the clerk's office of the city of Boston, book 1249, page 696.

4. That the said mortgagee did not pay the consideration set forth in said mortgage, or any consideration, but that the said conveyance was made with intent to hinder, delay and defraud present and prospective creditors of J. Herbert Weidhorn, and was not intended as a genuine mortgage, but wholly to promote the interests and to protect the property of said bankrupt.

5. That thereafter the said bankrupt continued in possession of said property, and purchased other and further merchandise which he intermingled with the merchandise described in said mortgage, and sold the said property without any regard to said mortgage, or without making any accounting to the mortgagee, and without paying any interest, and appropriating to his own uses and purposes the whole of the proceeds of said mortgaged property, together with the proceeds of the property after acquired and sold in connection with said mortgaged property.

6. That the goods and chattels in the mortgage first described were at the execution thereof in the mortgagor's place of business at No. 691 Washington Street, Boston. That soon after the execution thereof the said place of business was abandoned, and certain of the said goods and chattels were removed to another State, and formed the stock of a business there carried on by said mortgagee for a short period of time. That thereafter the said goods and chattels were returned to said Boston, and became part of the stock of said mortgagor's business at 256 Washington Street, in said Boston.

7. That thereafter, to wit, on the fifth day of October, 1915, when a good part, if not all, of the property mentioned in the original mortgage had been sold or otherwise disposed of, and other and further debts had been contracted, and the bankrupt was insolvent and unable to pay his existing debts, and also proposing and intending to contract other and further debts, the said bankrupt, in further pursuance of said fraudulent scheme or conspiracy, did, with intent to hinder, delay and defraud his present and prospective creditors,

then and there did execute and deliver to his said brother, the defendant, Leo Weidhorn, a further mortgage and bill of sale, also purporting to secure a loan of $9091.14, and conveying the following-described goods and chattels, which was then and there all of the property of the said bankrupt, to wit:—

8 "All my" (meaning the said bankrupt) "stock in trade of jewelry, watches, clocks, optical goods, diamonds and precious stones, and the safe and cash register, and all tools, show cases and wall cases and fixtures, located and situated in the store and show windows occupied by me at 256 Washington Street, in said Boston, meaning and intending hereby to convey and transfer any and all personal property belonging to me as located in said store or show window, together with all stock and property which shall from time to time be added to said stock in trade and all the property in my store at said 256 Washington Street.

8. That the said mortgagee did not pay the consideration set forth in said morgage, or any consideration, but that the said conveyance was made with intent to hinder, delay and defraud present and prospective creditors of J. Herbert Weidhorn, and was not intended as a genuine mortgage, but wholly to promote the interest and to protect the property of the said bankrupt.

9. That thereafter, from said fifth day of October, 1915, down to the twelfth day of February, 1916, the bankrupt continued in possession of said property, and purchased other and further merchandise, which he intermingled with the merchandise described in said mortgage, or without making an accounting to the mortgagee, and without paying any interest, and appropriated to his own use and purpose the whole of the proceeds of said mortgaged property.

10. That on or about the twelfth day of February, 1916, said mortgagee purported to make an entry for the purpose of foreclosing both of said mortgages, and with the consent and assistance of said mortgagor, and as part of the schemes or conspiracies herein alleged, took possession of all the goods and chattels then in the possession of said mortgagor at his place of business at said 256 Washington Street, and appointed said mortgagor as his, said mortgagee's, agent, to retain custody thereof and sell the same in course of business, and to continue the business.

11. That on or about the twenty-first of February, 1916, and at eight o'clock in the forenoon, the mortgagee purported to hold a foreclosure sale under the terms of one or both of said mortgages; that said sale was not sufficienfly or properly advertised, was

9 not attended by a sufficient number of bona fide prospective purchasers, and, in addition to an auctioneer, was attended by only the mortgagor, the mortgagee and their attorney, who was also their brother-in-law.

12. That said auctioneer purported to sell said goods and chattels under one or both of said mortgages to said mortgagee. That said mortgagee purported to purchase the property alleged to be covered by the first mortgage for the sum of $5005, paying therefor $5.00 in money and his promissory note for $5000; and that said mortgagee purported to purchase the property alleged to be covered by the

second mortgage for the sum of $1005, paying therefor $5.00 in money and his promissory note for $1000.

13. That thereafter said mortgagor continued to manage said business until on or about the twenty-fifth day of February, 1916, when he packed, or caused to be packed, the goods and chattels then forming the stock and fixtures of said business, caused the same to be transported by people employed by him to the place of business of the defendant, The Boston Storage Warehouse Company, and there to be stored in the name of said mortgagee.

14. That on the day immediately following, to wit, on the twenty-sixth day of said February, said mortgagor, in furtherance of said schemes or conspiracies to hinder, delay and defraud his creditors, filed a voluntary petition in bankruptcy in this court, which resulted in his adjudication and in the election of the plaintiff herein as said trustee.

15. That said goods and chattels are now in the possession of said warehouse, and stored in the name of said mortgagee; that on or about the twenty-second day of said March, the plaintiff, as trustee, and because of facts disclosed during his examination as trustee of said bankrupt, the mortgagor, notified said warehouse by mailing a letter, properly addressed and postage prepaid, to said warehouse; that as said trustee he claimed title to and possession of said goods and chattels.

16. That creditors of said bankrupt mortgagor have proved their claims; that they have not been paid; that the said bankrupt has assets of less than ten dollars other than the goods and chattels fraudulently conveyed as herein alleged; that the debts of said bankrupt, exclusive of debts to said mortgagee, if any, were by him scheduled as $10,134.06.

Wherefore, your plaintiff prays:—

1. That the mortgagee, Leo Weidhorn, and the warehouse-men, The Boston Storage Warehouse Company, be each made a party hereto, and summoned forthwith to appear and answer to the bill of complaint.

2. That the defendants, and each of them, and their servants, agents or employes, be forthwith severally enjoined, pending the determination of this proceeding, from removing and from permitting any person to remove from said warehouse any of the said goods and chattels in said warehouse contained.

3. That the defendant, Leo Weidhorn, and his agents and attorneys, be forthwith severally enjoined, pending the determination of these proceedings, from executing any instrument of transfer, or assigning or endorsing such instrument, with the purpose of changing title to or possession of said goods or chattels.

4. That the several mortgages or bills of sale by way of mortgage in this bill of complaint described be declared void as against the creditors of said bankrupt, at the execution thereof, and as against the plaintiff as trustee as aforesaid.

5. That the defendant, Leo Weidhorn, be ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of February, 1916.

6. That the defendant, The Boston Storage Warehouse Company, and its agents, officers and employes, be severally forthwith enjoined, pending the determination of there proceedings, from removing and from permitting any person to remove from said warehouse any of the said goods and chattels in said warehouse contained.

7. That the defendant, Leo Weidhorn, be ordered forthwith to surrender to your plaintiff, as said trustee, the warehouse receipt, or receipts, issued to him by said warehouse for said goods and chattels, and to execute to your plaintiff, as said trustee, a bill of sale of said goods and chattels.

11 8. That the said Boston Storage Warehouse Company be ordered forthwith to deliver to your plaintiff, as said trustee, possession of said goods and chattels.

9. For such further and other relief as to this court seems meet and proper.

BENJAMIN A. LEVY,
Trustee as Aforesaid.

Boston, March 30, 1916.

Then personally appeared Benjamin A. Levy, trustee as aforesaid, and made oath that the foregoing bill of complaint by him subscribed is true to the best of his information and belief.

Before me,

SIDNEY DUNN,
Notary Public.

[Endorsed:] United States of America. District Court of the United States for the District of Massachusetts. In Bankruptcy, No. 23319. In the matter of J. Herbert Weidhorn, Bankrupt. Benjamin A. Levy, Trustee, v. Leo Weidhorn and The Boston Storage Warehouse Co. Bill of Complaint. Filed April 1, 1916, 3:15 p. m. Let respondents be made parties to these proceedings, subpœna to issue in accordance with Equity Rule 12 and respondents enjoined as prayed for. Olmstead, Referee. From the office of Swift, Friedman & Atherton, 30 State St., Boston.

12 B and C.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to Leo Weidhorn, of Boston, in our said District, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the Massachusetts District, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said court, sitting in bankruptcy, at the office of the clerk of said court, in Boston, in said district, on or before the twentieth day after service of this subpœna, and then and

there file your answer or other defense to a bill of complaint exhibited against you in our said court, wherein the I. Charak Company is the petitioner, and you are the respondent, having been made party to these proceedings and are temporarily enjoined as prayed for in said petition; and to do further and receive that which our said District Court, sitting in bankruptcy, shall consider in this behalf. And this you are in nowise to omit under the pains and penalties of what may befall hereon.

And the marshal of said District of Massachusetts, or his deputy, is hereby commanded to make service of this subpœna and to return the same with his doings thereon into the office of the clerk of our said court on or about the twenty-eighth day of April, 1916.

Witness, the Honorable James M. Morton, Jr., at Boston, this seventh day of April A. D. 1916, in the one hundred and fortieth year of the Independence of the United States of America.

MARY E. PRENDERGAST,
Deputy Clerk.

[MEMORANDUM.—The respondent is required to file his answer or other defense in the referee's clerk's office, 121 P. O. Building, Boston, on or before the twentieth day after service, excluding the day thereof; otherwise the petition may be taken pro confesso.]

Due and sufficient service of this subpœna is hereby acknowledged this twenty-first day of April, 1916.

LEO WEIDHORN,
By His Attorney, A. W. HOE.

13 [Endorsed:] No. 23319. In Bankruptcy. I. Charak Co. v. Leo Weidhorn. Subpœna. Returnable April 28, 1916. Filed April 28, 1916, 9 a. m. Wm. Charak, Attorney, 27 School St., Boston.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the following is a true copy of the appearance of William M. Blatt for Leo Weidhorn, filed April 7, 1916, in the clerk's office of said court, in the cause in bankruptcy, No. 23319, J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Boston, in said district, this twenty-first day of May, A. D. 1917.

[SEAL.] WILLIAM NELSON, *Clerk.*

D.

I appear for Leo Weidhorn specially, denying jurisdiction.

WILLIAM M. BLATT,
43 *Tremont St., Boston.*

Filed April 7, 1916, 10 a. m.

14 E.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319. In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

BENJAMIN A. LEVY

against

LEO WEIDHORN and THE BOSTON STORAGE WAREHOUSE COMPANY.

Answer of Leo Weidhorn, Defendant, to Bill of Complaint.

And now comes the defendant, Leo Weidhorn, in the above matter, and for answer says:

1. That as to the first paragraph he admits the allegations therein.

2. That as to the second paragraph he denies each and every statement therein, except that he is the brother of the bankrupt, and is in business as an insurance broker, and that a mortgage for nine thousand ninety-one and 14/100 (9091.14) dollars was executed by the bankrupt to the defendant, and more specifically he denies that the bankrupt and he entered into any scheme to hinder, delay or defraud the creditors of the bankrupt, and denies that the consideration for the mortgage was not genuine, and denied that the purpose of said mortgage was to prevent the creditors of the bankrupt from reaching or applying to the claims any of the assets described in the said mortgage, except in so far as such intention was involved in his, the defendant's, desire to protect his own valid claim.

3. That as to the third paragraph the defendant denies that the mortgage therein described was entered into in pursuance of any scheme or conspiracy to defraud, but as to the other allega-
15 tions in said paragraph the defendant admits the same.

4. That as to the fourth paragraph the defendant denies each and every allegation therein.

5. That as to the fifth paragraph the defendant says that such sales as the bankrupt made were permitted by the mortgagee and were made with his knowledge, and as to the rest of the paragraph the defendant is informed and believes that it is true.

6. That as to the sixth paragraph the defendant is informed and

believes that the statements therein contained are true, except that the mortgagee never carried on said business.

7. That as to the seventh paragraph the defendant says that at the time of the placing of the second mortgage he is informed and believes that a large part of the original stock was still in said store, and the defendant further denies that the placing of the second mortgage was in pursuance of any fraudulent scheme or conspiracy; and the defendant further denies that he knew, or had reason to know, that the bankrupt was insolvent and unable to pay the existing debts, or that he proposed and intended to contract other and future debts.

8. That as to the eighth paragraph the defendant denies each and every allegation therein.

9. That as to the ninth paragraph the defendant says that property purchased subsequently to the 5th of October, 1915, became part of the said mortgage by the terms thereof, and cannot, therefore, be said to be intermingled, and that the defendant was aware of all that was done with relation to said property; and as to the rest of said paragraph the defendant is informed and believes that it is true.

10. That as to the tenth paragraph the defendant denies that the foreclosure therein described was part of any fraudulent scheme or conspiracy.

11. That as to the eleventh paragraph the defendant denies that the sale therein described was not a sufficient or proper one, and as to the remainder of the paragraph the defendant says that there was a sale at the time and place mentioned under the terms of both mortgages, and that he has no present recollection of who attended the sale besides the mortgagee and one other person who was not acting as attorney for either the mortgagor or mortgagee.

12. That as to the twelfth paragraph the defendant admits that the statements therein are true.

13. That as to the thirteenth paragraph the defendant says that no business was done in said store between February 21, 1916, and February 25, 1916, except the packing of the goods and chattels then forming the stock and fixtures of said business, and that said time was consumed in said packing, and that as soon as the packing was finished the goods were stored as described, and that no sales were made after the foreclosure sale above described.

14. That as to the fourteenth paragraph the defendant denies that the petition in bankruptcy, filed in this court, was filed in furtherance of any fraudulent scheme or conspiracy.

15. That as to the fifteenth paragraph the defendant is informed and believes that the statements therein are true.

16. That as to the sixteenth paragraph the defendant is informed and believes that the statements therein contained are true.

LEO WEIDHORN.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, April 17, 1916.

Then personally appeared Leo Weidhorn, and made oath that the statements above subscribed by him are true, except so far as they are made upon information and belief, and that as to the latter he is informed and believes that they are true.

Before me,

WILLIAM M. BLATT,
Notary Public.

[Endorsed:] No. 23319, In Bankr. Benjamin A. Levy v. Leo Weidhorn and Boston Storage Warehouse Co. Answer of
17 Leo Weidhorn, Deft., to Bill of Complaint. Filed April 24, 1916, 9:55 a. m. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

F.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

BENJAMIN A. LEVY, of Boston, Massachusetts, as he is Trustee in Bankruptcy of J. Herbert Weidhorn, Plaintiff, against Leo Weidhorn, of said Boston, and The Boston Storage Warehouse Company, a corporation duly organized by law, and having an usual place of business in said Boston, Defendants.

Motion to Dismiss Bill of Complaint.

And now comes the defendant, Leo Weidhorn, in the above matter, and moves that the bill of complaint be dismissed on the ground that the referee had no jurisdiction to act thereon.

WM. M. BLATT,
Attorney for Defendant Weidhorn.

18 [Endorsed:] No. 23319. Benjamin A. Levy v. Leo Weidhorn and The Boston Storage Warehouse Co. Motion to Dismiss Bill of Complaint. Filed April 25, 1916, 9 a. m. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

G.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Decree.

This case came on to be heard, was argued by counsel, and upon consideration thereof, It is hereby ordered and decreed that the several mortgages, or bills of sale by way of mortgage, in the bill of complaint described be and they hereby are ordered declared void as against the creditors of said bankrupt at the execution thereof, and as against the plaintiff, as trustee aforesaid, in accordance with the fourth prayer of said bill; that the defendant, Leo Weidhorn, be, and he hereby is, ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of February, 1916, in accordance with the fifth prayer of said bill; and that the defendant, Leo Weidhorn,
19 be, and he hereby is, ordered forthwith to surrender to said plaintiff, as trustee, the warehouse receipt, or receipts, issued to him by said warehouse, for said goods and chattels, and to execute to said plaintiff, as said trustee, a bill of sale of said goods and chattels, all in accordance with the seventh prayer of said bill.

Witness, my hand, at Boston, this twenty-seventh day of July, A. D. 1916.

JAMES L. OLMSTEAD,
Referee in Bankruptcy.

[Endorsed:] No. 23319. In Bankruptcy. Law of 1898. In the Matter of J. Herbert Weidhorn, Bankrupt. Decree on Petition of B. A. Levy, Trustee, v. Leo Weidhorn et al. July 27, 1916.

H.

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition for Review.

To Honorable James M. Olmstead, Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is the defendant in a petition in the nature of a bill in equity brought by the trustee of the bankrupt against

him, and that a decree and order were entered on the twenty-seventh day of July, 1916, a copy of which decree and order is hereto annexed.

20 That such order was, and is, erroneous in that there is no warrant in law for the said order upon the evidence in the case;

That the fraud alleged in the said bill of complaint has not been proven;

That no fraud has been proven on the part of your petitioner;

That said order and the finding upon which it is based are against the weight of the evidence.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated at Boston, the first day of August, 1916.

LEO WEIDHORN.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston:

I, Leo Weidhorn, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

LEO WEIDHORN.

Subscribed and sworn to before me this first day of August, 1916.

WILLIAM M. BLATT,
Notary Public.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Decree.

This cause came on to be heard, was argued by counsel, and upon consideration thereof, It is hereby ordered and decreed that

21 the several mortgages, or bills of sale by way of mortgage, in the bill of complaint described be and they hereby are ordered declared void as against the creditors of said bankrupt, at the execution thereof, and as against the plaintiff, as trustee aforesaid, in accordance with the fourth prayer of said bill;

That the defendant, Leo Weidhorn, be, and he hereby is, ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of

February, 1916, in accordance with the fifth prayer of said bill; and

That the defendant, Leo Weidhorn, be, and he hereby is, ordered forthwith to surrender to said plaintiff, as trustee, the warehouse receipt, or receipts, issued to him by said warehouse, for said goods and chattels, and to execute to said plaintiff, as said trustee, a bill of sale of said goods and chattels, all in accordance with the seventh prayer of said bill.

Witness, my hand, at Boston, this twenty-seventh day of July, A. D. 1916.

——— ———.

[Endorsed:] No. 23319. J. Herbert Weidhorn. In Bankruptcy, No. 23319. Petition for Review. Filed Aug. 1st, 1916, 1.45 P. M. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

22 1.

In the District Court of the United State, District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. Herbert Weidhorn, Bankrupt.

Certificate by Referee to Judge on Petition of Benjamin A. Levy, Trustee, v. Leo Weidhorn and the Boston Storage Warehouse Company.

I, James M. Olmstead, one of the referees of said court in bankruptcy, do hereby certifiy that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:—

This was a petition to review a decree entered in favor of the complainant in a bill brought by Benjamin A. Levy, as trustee of said estate, against Leo Weidhorn and the Boston Storage Warehouse Company. The purpose of the proceeding was to set aside, by virtue of the provisions of Section 70*e* of the Bankruptcy Act, certain mortgages given by the debtor to said respondent, Leo Weidhorn. Section 70*e* provides that: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided," etc.

The Massachusetts Statute, R. L., Chap. 159, Sec. 2, Clause 8, provides that certain courts have jurisdiction over "suits to reach and apply, in payment of a debt, any property, right, title or interest, real or personal, of a debtor, liable to be attached or taken on execution in an action at law against him, and fraudulently conveyed by him with intent to defeat, delay or defraud his creditors," etc.

Other applicable provisions of the Bankruptcy Act are secs. 3*a*; 67*d, e.*

The bill of complaint was filed on April 1, 1916, and a general answer thereto was filed by the defendant Weidhorn on April
23 24, 1916, followed on April 25, 1916, by a motion to dismiss for want of jurisdiction. The facts are so ably and truthfully presented in the brief the learned counsel for the complainant filed July 6, 1916, that I can add but little thereto by way of summary.

The debtor and respondent, Leo Weidhorn, are brothers. On January 1, 1915, the debtor was in the jewelry business, at No. 671 Washington Street, Boston. His brother Leo was in the insurance business, and in the year 1906 furnished the capital to his brother, J. Herbert Weidhorn, with which to start him in business in Malden. After having made a number of loans he obtained from the debtor a mortgage to secure him for his advances, which mortgage was subsequently discharged when all danger of financial trouble had disappeared, the debtor apparently prospering in business. During the month of February, 1915, the debtor's landlord began to press him for his rent, and on March 13, 1915, brought suit against him and trusteed the respondent Leo. In consequence of this trouble with the landlord, I find that the debtor was induced to give his brother Leo a mortgage, on February 3, for $9091.14, which was security for that amount of money due the respondent Leeo for loans which he had from time to time made.

It was in evidence that Leo managed the financial end of the business, while the debtor, J. Herbert, attended to its details. At all times Leo was familiar with his brother's business, even to the extent of keeping some of the books in his own handwriting. At the time this mortgage was given the debtor only owed $800 or $900, in addition to his indebtedness to the Washburn Realty Company, his landlord.

I find that the debtor's chief purpose was to protect his brother at all hazards, even though this and a subsequent mortgage might have the effect to hinder, delay and defraud creditors. On March 27, 1915, a fortnight after he had been sued, the debtor moved to Manchester, New Hampshire, where he carried on business. Subsequently the suit of March 13 ripened into judgment and execution, and negotiations were entered into by which the debtor, during his absence from Massachusetts, might be relieved from arrest. Early in October the debtor returned to Boston and resumed busi-
24 ness at No. 256 and No. 449 Washington Street. On October 5 the debtor executed a new mortgage for the same amount to his brother Leo, the only difference being that it contained an after property clause.

Certain evidence was presented by two disinterested witnesses, Max W. Alberts and David Menzer. Mr. Alberts, who was a creditor on February 3, 1915, for $615.40, testified that the debtor in February, after he had learned of the mortgage, came to his office and stated that he did not get any money from his brother, and that he had made the mortgage to secure himself against the landlord; and in answer to Mr. Alberts' remark that the debtor would have trouble with other creditors, said, "You are practically the only creditor I

have, as I owe only $800 or $900," and made no mention of any indebtedness to his brother. David Menzer, a jeweler, to whom the debtor owed $313.50 at the time of the October mortgage, testified to a conversation with the debtor in which he referred to trouble with his *landlord, and said* that the mortgage was a protective mortgage, and that he owed only about $800 or $900. Between October and the close of the Christmas holiday season, the debtor seems to have incurred large liabilities, his schedule showing, at the time of his failure on February 26, 1916, liabilities amounting to $10,134.06 and assets of $7.25. About the middle of January, 1916, suits were brought at the time when the debtor was ill, and keepers were put in his store.

On February 21 a foreclosure sale took place of the two mortgages. I find that this sale was a mere form gone through by the brothers, with the assistance of Mr. MacKusick, a brother-in-law of the debtor, the two brothers, the auctioneer and Mr. MacKusick being the only ones present, and the sale having been held at an unusually early hour in the morning. The goods were subsequently packed up by the debtor and removed to the respondent's storehouse. The respondent Leo gave the auctioneer a note for $5000 for the purchase of the goods covered by the first mortgage and a note of $1000 for the goods covered by the second mortgage. These goods were invoiced at a value of about $12,000, their real value probably
25 being between $7000 and $8000. I find the notice of the sale of the foreclosure was a few days after the 5th of February, when the four months' period would have expired. On the 26th day of February, five days after the foreclosure sale, the debtor filed his petition in bankruptcy. To aid him in so doing, his brother-in-law, Mr. MacKusick, took his oath to the schedules, and the brother Leo gave an attorney in Mr. MacKusick's office a check for $100 to pay the bankruptcy expenses.

Such, in brief, are the facts as I find them to be. Upon careful consideration of the testimony, I am led to conclude and find that the debtor intended to hinder, delay and defraud his present and future creditors; that the schedule showed a number of creditors who were such at the time of the February and October mortgages. I further find that the brother Leo, who was a very shrewd and intelligent business man, was fully conversant with the details of the debtor's business from the outset; that, in fact, the business was rather Leo's than J. Herbert's, and that the relation between them was rather that of principal and agent than of debtor and creditor. I find that the respondent Leo fully participated in the fraudulent intent of the debtor to hinder, delay and defraud his creditors.

Turning now to the law as applicable to the above facts, it is to be borne in mind that liens to be valid must be "given or accepted in good faith, and not in contemplation of or in fraud upon this act." Sec. 67*d*.

This bill is brought by virtue of the principles contained in the Statute of Elizabeth. The history of this statute is ably presented in "Creditors' Rights and Remedies," by Glenn, secs. 66-70.

In Klinger v. Hyman (C. C. A.), 223 Fed. 257, 263, the history of this famous act is fully presented. In this same case the court says: "It is the fraudulent intent which invalidates."

A valuable note on the Statute of Elizabeth, by Hon. James M. Kerr, is found in the case of Platt v. Schreyer, 25 Fed. 83, 92; s. c. Schreyer v. Scott, 134 U. S. 405.

In English v. Brown, 219 Fed. 248, 262, 264, is to — found an excellent review of authorities by Hunt, C. J.

26 A case similar to the instant one is Green v. Tantum, 19 N. J. Eq. 105; affirmed in 21 N. J. Eq. 364. This was a transfer by one brother to another for value, but with intent to defraud creditors where the vendee was affected by notice and put upon his inquiry.

Perhaps the leading case is that of Sexton v. Wheaton, 8 Wheaton, 229, cited in Adams v. Collier, 122 U. S. 382, 388. The latest Massachusetts case relied upon by the learned counsel for the complainant is Rolfe v. Clarke, 224 Mass.

In addition to the cases contained in the brief of learned counsel for the complainant, the following Massachusetts cases may be cited: Mowry v. Reed, 187 Mass. 174; Gately v. Kappler, 209 Mass. 426; Holbrook v. International Trust Co., 220 Mass. 150.

The learned counsel for the respondent contends that the referee sitting as a court of bankruptcy has no jurisdiction. At the hearing I ruled that if the proceeding was equitable and plenary, the referee had jurisdiction, and that the respondent having appeared in answer had admitted the jurisdiction. Since the amendments of 1903 and 1910 the jurisdiction of the bankruptcy court no longer depends upon the consent of a respondent.

In the case of O'Brien, 21 Am. B. R. 11, the jurisdiction of the referee was sustained by Judge Dodge. In re Jules v. Frederick Co., 27 Am. B. R. 136, and note; 34 Am. B. R. 5, and note; s. c. 193 Fed. 533, and 200 Fed. 747; in Studley v. Boylston National Bank, 30 Am. B. R. 161, and note; also 164; s. c. 229 U. S. 523, which was a case of recovery of a preference, the Supreme Court says: "The case was tried by the referee." And further on, "* * * but if, as found by the referee * * *" § 41*a* (4). Collier on Bankruptcy (10th Ed.), page 595, notes 40, 41.

And the said question, together with the pleadings, testimony, and briefs of the learned counsel, is certified to the judge for his opinion thereon.

Dated at Boston, this twenty-ninth day of September, A. D. 1916.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

27 [Endorsed:] No. 23319. In the Matter of J. Herbert Weidhorn, Bankrupt. Certificate by Referee to Judge on Petition for Review of Leo Weidhorn. United States District Court. Filed in Oct. 2, 1916, 3.50 p. m. Clerk's Office, Mass. Dist.

J.

The District Court of the United States for the District of Massachusetts.

No. 23319, in Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

March 8, 1917.

MORTON, *J.*:

This case presents an important question as to the jurisdiction of the referee. From the certificate it appears that, more than four months before the institution of bankruptcy proceedings, the bankrupt had conveyed property to his brother, LEO Weidhorn. There is no question but what, at the time of the bankruptcy, this property was in the exclusive possession of the brother under an actual claim of ownership. The trustee in bankruptcy filed with the referee what is called a "bill of complaint" against LEO; it is in form and in substance a well-drawn bill in equity, alleging that the conveyances in question from the bankrupt to the respondent were invalid, because made in fraud of creditors, under the Statute of Elizabeth and the Bankruptcy Act, Sec. 70*a*. Upon the filing of this bill the
28 referee directed that a subpœna issue under the equity rules of this court, and also issued a temporary injunction, as prayed for, restraining the transfer of the property pendente lite. The subpœna was in the usual form of those used in this court, except that it directed the defendant to appear before said court "sitting in bankruptcy," and notified the defendant to file his answer "in the referee's clerk's office." It was signed by one of the deputy clerks of this court, and bore the teste and seal of the court. The bill was filed only with the referee, and no order was made in the proceedings except by him.

The respondent seasonably objected to the jurisdiction of the referee, and afterwards filed an answer to the merits. By so doing, he did not assent to the referee's jurisdiction.—Louisville Trust Co. v. Comingor, 184 U. S. 18, at 26. The referee proceeded to hear and determine the merits of the controversy, and entered a final decree against the respondent, declaring the several mortgages or bills of sale in question to be void, and ordering the surrender of the goods in question to the trustee, and an account. Both the jurisdictional question and the merits of the case are certified for review.

The proceedings are in no sense summary, nor are they so regarded either by the referee or by the parties. The referee's decision is, that a trustee in bankruptcy may proceed before a referee by plenary suit, unlimited as to amount, to recover property never in the possession of the Bankruptcy Court.

The duties of the referee do not begin until the case has been referred to him; and his jurisdiction, therefore, includes only such

parts of the bankruptcy jurisdiction of the District Court as are carried by the reference. The order of reference was made under General Order XII. (1), which provides as follows: "And thereafter all proceedings, except such as are required by the act or these General Orders to be before the judge, shall be had before the referee." If the referee has jurisdiction of the present suit, it must be because it is covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under Section 24, as—

29 "covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate";

Baker, J., in re Friend, 134 F. R. 778 (C. C. A. 7th Cir.) It does not ordinarily include suits by the trustees against third persons. The word is frequently used in the General Orders; always, I think, in the same sense (e. g., in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.); when it is intended to refer to suits in equity or actions at law, they are distinctly specified (G. O. XXXVII.). It seems to me that "proceedings," in the order under discussion, is used in its established meaning as applied to bankruptcy matters, and that it does not include suits brought by the trustee against third persons in respect to property not in the custody of the Bankruptcy Court.

If the order of reference be construed as broadly as the plaintiff desires, it is questionable whether it would be valid. It would amount to a peculiar delegation of the general equity powers of the court, the exact limits of which, territorial or otherwise, it is not easy to understand. If it be regarded as covering all controversies to which the trustee in the case referred might be a party—which is the view of the referee as I understand it—the effect is to create a new court, having concurrent jurisdiction in equity with the State courts, and possibly with the District Court, as to cases in which a certain person, viz., the trustee in bankruptcy of the estate referred may be a party.

In In re Steuer, 5 A. B. R. 209 (D. C. Mass.), where a plenary suit of this character was heard before the referee without objection, Judge Lowell, with "great doubt" held that the District Court had jurisdiction to make a decree in favor of the complainant; and he ordered that the decree issue as if made originally by the judge, and not simply as an affirmance of the decree of the referee.

30 It seems that if the objection had been seasonably taken and insisted upon, as it was in this case, a different result would have been reached. In In re Carlisle, 29 A. B. R. 373 (D. C. N. C.), in In re Walsh Bros. (D. C. Ia.), 163 F. R. 352, and in In re Overholzer, 23 A. B. R. 10 (an able opinion by the referee), it was explicitly held that the referee did not have jurisdiction of a

plenary suit of this character. The weight of opinion among the text writers is in the same direction. Remington on Bankruptcy, 2d ed., secs. 545 and 1695, collecting cases; Loveland on Bankruptcy, 4th ed., Sec. 37. Collier on Bankruptcy, 10th ed., p. 595, says that the question is doubtful. "And there are instances where such jurisdiction has been asserted and fully sustained by the District Court," but the cases cited do not support the statement. In In re O'Brien, 21 A. B. R. 11, Referee Olmstead, in this district, took jurisdiction of a plenary suit and appointed receivers, but it was done by agreement of the respondents. In In re Shultz & Mark, 11 A. B. R. 690, the referee held, in a long opinion, that under a special rule in that district he had jurisdiction against objections thereto. It is the only express decision in the plaintiff's favor which has been brought to my attention.

It seems to me that, both upon the better reasoning and upon the great weight of authority, the referee has no jurisdiction of plenary suits of this character. They often involve very substantial amounts,—in this case, for instance, from $7,000 to $12,000,—and I think they should be filed like other suits in equity in the District Court, or in the proper State Court.

There must be an order vacating the referee's decree and dismissing the bill, with costs, as taxed in an equity suit in this court.

[Endorsed:] 23319. J. Herbert Weidhorn. Opinion.

31 K.

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

At Boston, in said District, on the eighth day of March, A. D. 1917, upon the question certified to the court by the referee in said matter on the second day of October, A. D. 1916:

Now, therefore, after hearing arguments of Percy A. Atherton, Esquire, of counsel for the trustee, and William M. Blatt, Esquire, counsel for the respondents, and after due consideration of the same,

It is hereby ordered and decreed that the order of the referee be, and it hereby is, vacated, and the bill dismissed, with costs.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness, the Honorable James M. Morton, Jr., Judge of said court, and the seal thereof, this eighth day of March, A. D. 1917.

[L. S.] MARY E. PRENDERGAST,
Deputy Clerk.

[Endorsed:] No. 23319. In Bankruptcy. Law of 1898. J. Herbert Weidhorn, Bankrupt. Order on Certified Question.

32 *Answer in Lieu of Motion to Dismiss and Further Answer of Leo Weidhorn to the Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.*

[Filed October 10, 1917.]

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The said Leo Weidhorn, especially appearing for the purpose of this answer and no other, and asserting that this court has no jurisdiction over it, or over the subject-matter mentioned in said petition, and not assenting to the bringing of said petition in this court, for answer thereto says:

Answer in Lieu of Motion to Dismiss.

For answer in lieu of a motion to dismiss the aforesaid petition the respondent says that it appears upon the face of the petition and the accompanying record,—

(1) That this is a petition to revise the proceedings of the District Court;

(2) That the matter involved in these proceedings is not a bankruptcy proceeding contemplated by Section 24*b* of the Bankruptcy Law of 1898.

And there being no jurisdiction conferred upon this Honorable Court to revise the proceedings of the District Court except by said Section 24*b* of the Bankruptcy Law, this Honorable Court is without jurisdiction to entertain the above-entitled petition for revision.

Wherefore, the said responedent moves this Honorable Court that this petition for revision be dismissed.

Further Answer.

And for further answer the respondent, not waiving, but relying upon his answer in lieu of a motion to dismiss, says:

First. The respondent admits the allegations contained in the first, second, third, fourth and fifth paragraphs of the petition to revise now before this Honorable Court.

33-34 Second. That as to the sixth paragraph the respondent denies that the court erred in any of the respects therein enumerated.

Wherefore, the respondent prays that the said petition be dismissed with costs.

LEO WEIDHORN,
By His Attorney, WILLIAM M. BLATT.

STATE OF MASSACHUSETTS,
Suffolk, ss:

Boston, October 10, 1917.

Then personally appeared William M. Blatt, and made oath that he is the attorney for the above-named Leo Weidhorn; that as attorney for said Leo Weidhorn he is authorized to sign and make oath to the foregoing answer on *their* behalf and for and on *their* behalf made oath to the truth of the statements of fact set forth in the foregoing answer.

Before me,
[SEAL.] ARTHUR I. CHARRON,
Notary Public.

35 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

Stipulation.

[Filed and Approved March 28, 1918.]

It is hereby stipulated in the above-entitled case that the annexed subpœna and return of service thereon may be printed as part of the record in this case, and used and considered in place of Exhibits B and C, on pages 12 and 13 of said record.

SWIFT, FRIEDMAN & ATHERTON,
Attorneys for Petitioner.
WM. M. BLATT, *Attorney for Respondent.*

36 B and C.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to Leo Weidhorn and The Boston Storage Warehouse Company, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the Massachusetts District, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said court, sitting in bankruptcy, at the office of the referee's clerk of said court, in Boston, in said dis-

trict, on or before the twentieth day after service of this subpœna, and then and there file your answer or other defense to a bill of complaint exhibited against you in our said court, wherein Benjamin A. Levy, trustee in bankruptcy of the estate of J. Herbert Weidhorn, is the complainant, and you are the respondents, having been made parties to these proceedings, and are temporarily enjoined as prayed for in said bill of complaint; and to do further and receive that which our said District Court, sitting in bankruptcy, shall consider in this behalf. And this you are in nowise to omit, under the pains and penalties of what may befall hereon.

And the marshal of said District of Massachusetts, or his deputy, is hereby commanded to make service of this subpœna and to return the same with his doings thereon into the office of the clerk of our said court on or before the twenty-fourth day of April, 1916.

Witness, the Honorable James M. Morton, Jr., at Boston, this first day of April, A. D. 1916, in the one hundred and fortieth year of the Independence of the United States of America.

MARY E. PRENDERGAST,
Deputy Clerk.

[MEMORANDUM.—The respondents are required to file their answer or other defense in the referee's clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.]

37-38 UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, April 3, 1916.

I hereby certify that I have served the within subpœna on the within-named Leo Weidhorn, by giving to him in hand a true and attested copy of this subpœna, at 120 Water Street, Boston, in said district, and afterwards on the same day I served the within subpœna on the within-named Boston Storage Warehouse Company, by giving in hand to Edward L. Wingate, general manager thereof, a true and attested copy of this subpœna, at Westland Avenue, Boston, in said district.

JOHN J. MITCHELL,
United States Marshal,
By JAMES A. TIGHE, *Deputy.*

Fees.

Service	$4.00
Copies	.60
Travel	.18
	$4.78

[Endorsed:] No. 23,319. In Bankruptcy. Benjamin A. Levy, Trustee, v. Leo Weidhorn et al. Subpœna, Returnable April 24,

1916. Marshal's No. 704. United States Marshal's Office, Boston, Mass., Apr. 3, 1916. P. O. Building. Swift, Friedman & Atherton, Attorneys, 30 State St., Boston, Mass. Filed April 11, 1916.

39 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee to Revise in Matter of Law the Proceedings of the District Court.

Before Dodge, Bingham and Johnson, JJ.

Opinion of the Court.

May 28, 1918.

DODGE, *J.:*

The order or decree of the District Court which this petition seeks to revise directed the vacation of a decree made by the referee upon a bill in equity, filed and answered before him, and sustained by him after hearing the merits of the case as in plenary proceedings before the court; and it directed the dismissal of the bill on the ground that the referee had been without jurisdiction so to entertain or hear it.

1. We are asked to dismiss the petition to revise on the ground that it is not a petition within Sec. 24*b* of the Bankruptcy Act. It is contended that the question raised as to the referee's jurisdiction can be brought before us only by appeal under Sec. 24*a*.

The bill in equity, filed by the trustee in bankruptcy of the estate under administration, sought to avoid two conveyances
40 by the bankrupt to his brother, on the alleged ground that they had been made with intent to hinder, delay or defraud his creditors. The referee held the conveyances void, and ordered the defendant to account for or restore the property transferred.

The defendant's petition for review of the referee's decree by the District Court alleged only that the above findings and conclusions were not justified by the evidence. It did not allege that the referee had acted without jurisdiction. The referee's certificate to the District Judge, however, recited that the defendants had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary. The District Judge dealt only with the question of jurisdiction, undertaking no consideration of the merits of the controversy passed upon by the referee.

The trustee's present petition to this court, while it asks reversal

of the decree of dismissal, and for affirmance of the decree entered by the referee, raises before us only the question of the referee's jurisdiction. If he had jurisdiction, his result on the merits remains to be reviewed by the District Court.

Since the petition before us thus presents only the preliminary question of the referee's jurisdiction to proceed on the bill before him, we think it raises rather a question of procedure, under Sec. 24*b*, than a "controversy arising in bankruptcy proceedings," within the meaning of Sec. 24*a*. Such "controversies" arise over steps in bankruptcy proceedings which the court or referee has jurisdiction to take or refuse to take. When the referee's jurisdiction to investigate the merits of a controversy like this in summary proceedings is attacked, the question is properly raised before the Appellate Court by petition to revise an order of the District Court sustaining such jurisdiction. Schweer v. Brown, 195 U. S. 171. Shea v. Lewis, 206 F. R. 877; Gibbon v. Goldsmith, 222 F. R. 826. We see no sufficient reason to doubt that the question raised by a denial of the referee's jurisdiction to investigate the merits of such a controversy under the forms of a plenary suit, may be equally well raised by peti-
41 tion to revise. The question is one of law only. That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this.

2. The case had been referred generally, under Sec. 22 of the Bankruptcy Act, and according to General Order XII. The reference was not for any special or limited purpose. According to Clause 1 of said General Order,

"all the proceedings except such as are required by the Act or by these General Orders to be had before the Judge,"

were thereafter to be had before the referee, and according to Clause 2 of said order, the referee was thereafter to perform the duties which he was "empowered by this act to perform" in the matters arising in the case referred to him. We are unable to agree with the learned District Judge that "all the proceedings," in Clause 1, must be taken to mean only such proceedings of the bankruptcy courts as have been distinguished from controversies arising in bankruptcy proceedings for the purposes of Sec. 24. We think the order requires a broader construction, in view of all its provisions and of other provisions applicable, found in the Act.

Nothing either in the Act or in the General Orders expressly requires the proceedings upon a bill filed by a trustee like this, whereof "any court of bankruptcy" has jurisdiction under Sec. 70 (*e*), to be had before the judge. On the contrary, Sec. 38 (4) invests the referee with jurisdiction, "subject always to a review by the judge,"—

"to perform such part of the duties (with express exceptions not here applicable) as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders * * * except as herein otherwise provided."

Neither in the Act or the Rules or the Orders referred to are any provisions found which exclude such cases from the general operation of this section. The jurisdiction given by Sec. 70*e*, over such a proceeding, is in equity, as affording a remedy more adequate and complete than can be had at law. Wall v. Cox, 101 F. R. 403; Pond v. New York etc. Bank, 124 F. R. 992; Davis v. Gates, 235 F. R. 192,
195. There are certain injunctions which only the judge can
42 order,—Gen. Order XII. 3; but no such injunction was sought by the bill which the trustee filed.

Sec. 42 (*a*) of the Act provides for the keeping of records of proceedings in cases before the referee corresponding to those kept in equity cases before the Federal courts. Sec. 42 (*c*) makes the records so kept part of the records of the court, when certified and transmitted by the referee as there required. By General Order III. process, summons and subpœnas, under the court's seal and signed by the clerk, are to be furnished referees upon application therefor. In view of these provisions, we are not prepared to agree with the District Judge that to affirm the referee's jurisdiction in cases like this would amount to creating a new court having concurrent equity jurisdiction with the State courts and with the District Court. The jurisdiction so exercised would be that of the District Court as a court of bankruptcy, though exercised by an officer of that court given, for defined purposes, the powers of the court, with the right to issue its process; always, of course, subject to review by the judge.

Sec. 1. (7) of the Act provides that "courts" as used in the Act may include the referee; and for the purposes here material we think Sec. 38 (4) must be taken as intending to make that word as there used include the referee.

From the sections of the Act above referred to an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district; instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court. The provisions have been recognized as manifesting such an intention. Remington, Bankruptcy, 2d ed., secs. 496, 501. Re Steuer, 104 F. R. 976, 980.

We find no decisive objection to the above view in the fact that matters involving considerable amounts will be thereby often left to the referee's determination in the first instance. The same is true regarding matters as to which the referee's jurisdiction under the Act is unquestioned. It is true that the referee cannot punish for the
contempts referred to in Sec. 41, but must certify the facts to
43 the judge for his action. This, however, is only matter of procedure and is also applicable to proceedings whereof the referee's jurisdiction is unquestioned. That the referee has jurisdiction to act upon such a bill is the view which seems to us most in accordance with the general scheme contemplated by the Act for the primary hearing and determination of such controversies as are likely to arise between trustees of estates and adverse claimants. If the property in controversy here had been in the trustee's possession

and claimed from him, or a lien upon it asserted, by the defendant, the referee's jurisdiction would have been undeniable, though the above objections to its exercise would have been no less applicable.

Such a construction of the above provisions of the Act involves no substantial prejudice to any right of a defendant against whom such a bill is brought. If it were addressed to the judge instead of the referee, filed not with the referee but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the "duties conferred upon the bankruptcy court" in the case had been so for properly performed. The referee's report, with the evidence before him if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the Act. It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference.

No court of appeals has yet passed upon the question here raised. Conflicting decisions regarding it may be found, made in other district courts either by the judge or a referee. In this district the decisions prior to that here appealed from have tended to sustain
44 the referee's jurisdiction. Re Steuer, 104 F. R. 976; Re Scherber, 131 F. R. 121, are the earliest in date which refer to the question. Neither decides it, but the suggestions regarding it in Re Steuer show much disinclination on the part of the court to hold the referee wholly without jurisdiction. Jurisdiction has been exercised by the referee in similar cases, and its exercise, apparent from the record, and therefore subject to disapproval by the court at any stage of the proceedings, has met with no objection either from the parties or from the courts either on review or appeal, in not a few reported cases in this and other circuits. See particularly Clarke v. Rogers, 183 F. R. 518; 228 U. S. 534; Studley v. Bank, 200 F. R. 249; 229 U. S. 523. We find no reason sufficient to require a decision involving the conclusion that the referee's jurisdiction was exercised in all such cases without statutory warrant, and must regard the decision that it was unlawfully exercised in this case as erroneous. We reach this conclusion without reference to the question whether or not there was seasonable objection to the jurisdiction by the defendant. It is not contended that his consent could have given a jurisdiction not given by the Act.

Let there be a decree reversing the decree of the District Court, and remanding the case to that court for further proceedings in accordance with this opinion. The trustee in bankruptcy recovers his costs in this court.

45 On April 16, 1918, this case came on to be heard by the court, Honorable Frederic Dodge, Honorable George H. Bingham and Honorable Charles F. Johnson, Circuit Judges, sitting:—

Thereafter, to wit, on May 28, 1918, the Opinion of the Court (page 39) was announced, and the following Order of Court was entered:—

Order of Court.

May 28, 1918.

Let there be a decree reversing the decree of the District Court and remanding the case to that court for further proceedings in accordance with the opinion passed down this day. The trustee in bankruptcy recovers his costs in this court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 14, 1918, the following Final Decree was entered:—

Final Decree.

June 14, 1918.

This cause came on to be heard on April 16, 1918, upon the petition of Benjamin A. Levy, Trustee, to revise in matter of law the proceedings of the District Court for the District of Massachusetts, and answer thereto, and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed as follows: The decree of said District Court entered March 8, 1917, dimissing the bill in equity filed by the said Benjamin A. Levy, trustee, against Leo Weidhorn and another, in the matter of J. Herbert Weidhorn, bankrupt, No. 23319 in bankruptcy, is hereby reversed, and the case remanded to said District Court for further proceedings in accordance with the opinion of this court passed down May 28, 1918; and the petitioner recovers costs in this court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

46 Assented to as to form only.

WILLIAM M. BLATT,
Attorney for Respondent.

Thereafter, to wit, on July 30, 1918, the following Motion for Stay of Mandate was filed by the respondent:—

Motion for Stay of Mandate.

[Filed July 30, 1918.]

And now comes Leo Weidhorn, respondent in the above matter, and moves this Honorable Court that the mandate therein be stayed

until further order of the court for the reason that the respondent intends to petition the United States Supreme Court for a writ of certiorari in said matter.

WILLIAM M. BLATT,
Attorney for Respondent.

On the same day, to wit, July 30, 1918, the following Order of Court was entered:—

Order of Court.

July 30, 1918.

Upon motion of the respondent setting forth that he proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practices of the Supreme Court of the United states.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 46, inclusive, hereto prefixed, contain and are
47 a true copy of the record and all proceedings to and including August 1, 1918, in the cause in said court, numbered and entitled, No. 1302 (Original). Benjamin A. Levy, Trustee, Petitioner. In the Matter of J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this first day of August, A. D. 1918.

[Seal United States Circuit Court of Appeals First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit entitled Benjamin A. Levy, Trustee, petitioner, (In the matter of J. Herbert Weidhorn, Bankrupt), No. 1302, Original, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise, and we, being willing for certain reasons that the said

cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you
49 send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26742. Supreme Court of the United States, October Term, 1918. No. 656. Leo Weidhorn vs. Benjamin A. Levy, Trustee, etc. Writ of Certiorari.

50 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Leo Weidhorn, petitioner for a writ of Certiorari against Benjamin Levy, trustee, respondent, and there numbered 656 of October Term, 1918, upon the docket of said court, may be taken as a return by this Court to the writ of Certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this seventh day of November, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

51 United States Circuit Court of Appeals for the First Circuit.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

Stipulation.

(Filed November 7, 1918.)

In the above entitled action it is hereby stipulated that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Leo Weidhorn, petitioner for a writ of Certiorari against Benjamin Levy, trustee, respondent, and there numbered 656 of October Term, 1918, upon the docket of said court, may be taken as a return by this Court to the writ of Certiorari issued by the Supreme Court of the United States in said case.

WALTER HARTSTONE,
WILLIAM M. BLATT,
Attorney- for Leo Weidhorn.
LEE M. FRIEDMAN,
Attorney for Benjamin A. Levy.

Dated, Boston, November 7, 1918.

A true copy:
Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

52 [Endorsed:] File No. 26,742. Supreme Court U. S., October Term, 1918. Term No. 656. Leo Weidhorn, Petitioner, vs. Benjamin A. Levy, Trustee, etc. Writ of certiorari and return. Filed November 9, 1918.